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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No. 972. 136.

DAVID MARK CUMMINGS AND GRACE DUNLAP KENNEDY, APPELLANTS,

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED JULY 18, 1902.

(18,226.)

(18,226.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 373.

DAVID MARK CUMMINGS AND GRACE DUNLAP KENNEDY, APPELLANTS,

vs.

THE CITY OF CHICAGO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 11, 1901.

1 In the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

DAVID MARK CUMMINGS and GRACE DUNLAP Kennedy *vs.* CITY OF CHICAGO.	25737. In Chancery.

Mr. S. A. Lynde, solicitor for David Mark Cummings and Grace Dunlap Kennedy.

Mr. Charles M. Walker, corporation counsel for City of Chicago.

2 *Pracipe for Record.*

United States Circuit Court, Northern District of Illinois, Northern Division.

DAVID MARK CUMMINGS ET AL. *vs.* CITY OF CHICAGO.	25737.

To the clerk of the above-entitled court:

You will please prepare transcript of the record in this case, to be filed in the office of the clerk of the United States Supreme Court, under the appeal heretofore perfected to said court and include in the said transcript the following pleadings, proceedings and papers on file, to wit:

Bill of complaint,
Demurrer,
Order of February 8, 1901,
Decree of dismissal and allowing appeal,
Assignment of errors,
Bond on appeal,
Orders of June 26, 1901,
Clerk's certificate,

Said transcript to be prepared as required by law and the rules of this court and the rules of the United States Supreme Court, and on file in the office of the clerk of the said Supreme Court, at Washington, D. C. before July 20th 1901.

S. A. LYNDE,
Solicitors for Appellant.

(Endorsed:) Filed July 12, 1901, S. W. Burnham, clerk.

3 Pleas in the circuit court of the United States for the northern district of Illinois—northern division, begun and held at the United States court-room, in the city of Chicago, in said district and division, before the Honorable Christian C. Kohlsaat, district judge of the United States for said northern district of Illinois, on Tuesday, the fourteenth day of May, in the year of our Lord one thou-

sand nine hundred and one, being one of the days of the regular December term of said court, 1900, and of our Independence the one hundred and twenty-fifth year.

S. W. BURNHAM, *Clerk.*

DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY
vs.
CITY OF CHICAGO.
} 25737. In Chancery.

Be it remembered that on this day to wit: the eighth day of November, in the year of our Lord one thousand nine hundred came the complainants in said entitled cause by their solicitor, Mr. S. A. Lynde, and filed in the clerk's office of said court their certain bill of complaint, in words and figures following to wit:

4 & 5

Bill of Complaint.

Gen. No., 25737.

In the United States Circuit Court, Northern District of Illinois.

To the honorable the judges of said court, in equity sitting:

Your orators, David Mark Cummings and Grace Dunlap Kennedy humbly complaining, show unto your honors that they are citizens of the State of Illinois and residing in the city of Chicago in the county of Cook in said State, and that the City of Chicago, which is hereinafter named a defendant to this bill of complaint, is a municipal corporation, organized and existing under the laws of the State of Illinois.

Your orators further show unto your honors that they are the executors of the estate of Columbus R. Cummings, deceased, and his sole heirs-at-law and residuary devisees under his last will and testament, and as such heirs-at-law and devisees they are the owners in fee-simple of the following-described premises, which are situate in the city of Chicago, county of Cook and State of Illinois and known and described as follows, namely:

Block 108 in the subdivision made by the Calumet & Chicago Canal & Dock Company of parts of fractional sections 5 and 6, township 37 north, of range 15, east of the third principal meridian (a plat of which subdivision was recorded in the recorder's office of Cook county aforesaid on the 17th day of January A. D. 1874) excepting therefrom the right of way of the Baltimore, Pittsburg & Chicago Railway Company, and also excepting
6 the following portions of said block 108, to wit: Commencing at a point on the south line of 95th street 61.1 feet east of the intersection of the south line of 95th street and the northeasterly line of said right of way of said Baltimore, Pittsburg & Chicago Railway Company, thence running southeasterly parallel to said northeasterly line of said right of way 264.2 feet, thence southeasterly 115.7 feet, thence north 225.92 feet more or less to the south line of

95th street; thence westerly 296.37 feet more or less to the place of beginning; and commencing at a point in the northeasterly line of the Baltimore, Pittsburg & Chicago Railway Company's right of way 740.22 feet southeasterly from the intersection of the northeasterly line of said right of way of said Baltimore, Pittsburg & Chicago Railway Company and the south line of 95th street, thence in a southeasterly direction along said northeasterly line of said right of way for a distance of 356.78 feet, thence in a northeasterly direction along the east line, (or water line) on the west bank of the Calumet river for a distance of 300 feet to a point, thence in a southwesterly direction for a distance of 193.09 feet to the place of beginning.

Your orators further show unto your honors that said block 108 fronts to the east upon the stream known as the Calumet river, having a frontage of more than 800 feet on said river and that the portion of said block 108 which your orators now own has a frontage upon said Calumet river of about 479 feet, and that your orators as the owners of said portion of said block 108 are also the owners of the land under the water of the said stream up to the center line thereof, save and except as their title thereto may be affected by the deed of conveyance theretofore made by Columbus R. Cummings from whom they derive their title to said premises to the United States, which is hereinafter more fully stated and referred to.

7 Your orators further show unto your honors that the said Calumet river is a navigable stream, having its natural outlet into Lake Michigan, and forming at its mouth what is known as the harbor of South Chicago in said city of Chicago, and that it is one of the navigable waters of the United States; that upon it and by its means is carried traffic between the States of the United States and that it forms a connection as a highway for commerce between the State of Illinois and the other States of the United States.

That in its natural and unimproved condition said river was navigable for only small vessels and for only a short distance above its outlet into Lake Michigan, but that it has been improved by the United States, and its channel lines have been established, and its channel deepened and broadened.

That by act of Congress approved August 2nd, 1882, an appropriation was made for the improvement of the harbor at the outlet of said stream, and it was provided that with a view to the improvement of the Calumet river from its mouth to the fork at Calumet lake, the Secretary of War should appoint a board of engineers, who shall examine said river and report upon the practicability and the best method of perfecting and maintaining a channel for through navigation, limiting and locating the lines of channel to be improved by the United States, and of docks that might be constructed by private individuals, corporations or other parties, and clearly defining the same under the direction of the Chief of Engineers, United States Army, and that the Secretary of War should report to Congress the result of said examination and the cost of such improvement.

That thereafter, the Secretary of War appointed such board of

engineers, and that said board examined said river and caused a survey thereof to be made defining the lines of the channel thereof and of docks to be constructed thereon under the direction
8 of said Chief of Engineers; and that the said Secretary of War thereafter reported to the Congress of the United States the estimated cost of the proposed improvement of said river.

That thereafter by act of Congress passed July 5th, A. D. 1884, an appropriation by the Government of the United States was made for the improvement of said Calumet river, and it was provided in said act that no portion of the sum appropriated thereby for said improvement "shall be expended until the right of way shall have been conveyed to the United States free from expense and the United States shall be fully released from all liability for damages, to adjacent property to the satisfaction of the Secretary of War."

That thereafter the United States caused a plat to be made establishing the channel of said river and its lines and fixing and establishing the dock lines thereof, which said plat was approved by the Chief of Engineers of the United States Army and duly recorded in the recorder's office of Cook county aforesaid.

That after the making of said survey and the establishment by the United States of the channel and dock lines of said Calumet river, in pursuance of the said proviso in said act of Congress of July 5, 1884, making said appropriation for the improvement of said river, and of a similar proviso in the river and harbor act of August 5, 1886, continuing said improvements, the said Columbus R. Cummings by his deed of conveyance, bearing date the 5th day of January, A. D. 1888, granted to the United States of America a free and unobstructed right of way in front of said block 108, except the north 200 feet thereof, which said Cummings did not then own, but the title to which was subsequently acquired by him, the said right of way being bounded and described in said deed of conveyance as follows, to
wit, that portion lying between the proposed dock lines of the
9 Calumet river, as shown upon the plat thereto attached and made a part thereof, of block 108 (except the north 200 feet) in South Chicago, a subdivision made by the Calumet & Chicago Canal & Dock Company, of part of section 6 township 37 north range 15 east of the third principal meridian being a part of the channel of the Calumet river, as established and shown on the plat thereof, approved by the Chief of Engineers of the United States Army and duly recorded in the recorder's office of Cook county, Illinois, in which deed it was further provided that the shore or dock lines of said river as established and shown on said plat should thereafter for all purposes be taken as the true meandered lines of said stream and that the United States should thereafter have a free and uninterrupted right of way over and along the Calumet river from a line extended at right angles with the course of the said river from the terminus of the shore or dock line of the north boundary line of said land to another line extended at right angles with the course of the said river from the terminus of the shore or dock line of the south boundary line of said land and to the center of the stream for the improvement of the said Calumet river pursuant to said act

of Congress; and that said Cummings did by said instrument release to the United States of America all claims and demands of any and every nature which he might then have or thereafter have against it by reason of the improvement of said Calumet river.

That attached to said deed and made a part thereof was a plat showing the said dock or shore line of said block 108, which was designated upon said plat as "proposed dock" line, which said line was the line fixed and established by the Chief of Engineers of the United States Army as the channel or dock line of said river as established and shown on the plat of said river, approved by the said Chief of Engineers of the United States Army, and recorded in said recorder's office, which is referred to in said deed.

10 And your orators attach hereto, marked "Exhibit A" a copy of the said plat so attached to said deed, and pray that the same may be taken as a part of this, their bill of complaint, and also a copy of said plat filed for record as aforesaid of the survey so made by the Chief of Engineers, marked Exhibit A½.

And your orators aver and charge the fact to be that said deed was made by said Cummings under the provisions of said act of Congress of July 5, 1884, and of August 2nd, 1886, respectively, and that the making thereof by him was exacted by the United States as a condition precedent to the improvement of said river, and that by and under said deed and the terms and provisions thereof the dock line in front of said block 108 became for all purposes thereafter established and fixed as shown by said plat attached to said deed as the "proposed dock" line designated thereon, and that said line was established and fixed by the United States as the true meandered line of said stream.

Your orators show unto your honors that a similar deed in all respects was made to the United States, bearing date the 3rd day of November A. D. 1886 by the then owners of the north 200 feet of block 108, Mary D. Burdick and William R. Burdick, her husband, and that subsequently said Columbus R. Cummings acquired by mesne conveyances title to the said north 200 feet of said block 108 from said Mary D. Burdick, and that similar deeds were made to the United States by the owners of all of the property fronting on said Calumet river on both sides thereof from the point of its outlet into Lake Michigan to the limits of the survey and plan of improvement adopted for said river by the United States, and shown on the said plat approved by the Chief of Engineers of the United States Army.

That the United States by its duly authorized officials accepted said deeds of conveyance and thereafter entered upon the

11 improvement of said Calumet river in accordance with the surveys thereof and plans adopted therefor by the Chief of Engineers of the United States Army under the authority and direction of the Congress of the United States, and thereby established said dock or channel line on the west line of said river in the manner and form shown by said plat approved by the said Chief of Engineers and filed for record as aforesaid, a copy of that part of which relating to said block 108 was attached to the said deed so

made by said Cummings to the United States and is attached hereto as said "Exhibit A" to this bill of complaint. And that the United States took possession of said river and caused said channel of said river so fixed and established to be improved in accordance with said plan of improvement.

Your orators further show that on the 19th day of September 1890 the Congress of the United States passed an act to provide for the improvement of various rivers and harbors, and for the regulation of the navigable waters of the United States, and that the seventh section thereof was in the words following, to wit:

SEC. 7. "That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty or structure of any kind outside established harbor lines or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, boom, harbor, navigable river, or other water of the United States, in such manner as shall obstruct or impair navigation, commerce or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States under any act of the Legislative
12 Assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War;

Provided * * *"

That thereby the United States assumed jurisdiction and control over all navigable waters and rivers of the United States, including said Calumet river, and forbad- the erection of any structure therein without the permission of the Secretary of War.

That on the 3rd of March, 1899, the Congress of the United States passed an act, known as the river and harbor act, providing for the improvement of various rivers and harbors and for the regulation of the navigable rivers and harbors of the United States, and that the tenth section thereof was as follows:

SEC. 10. "That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other waters of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it sh-ll not be lawful to excavate or fill or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge * * * or the channel of any navigable water of the

United States, unless the work has been prior to beginning the same recommended by the Chief of Engineer- and authorized by the Secretary of War."

That thereafter, it became necessary for your orators, who were then in the possession of said premises as the executors of the estate of said Columbus R. Cummings and as the residuary devisees under his last will and testament and his sole heirs-at-law to build a new dock upon said premises and that for that purpose they caused plans to be prepared for the building of a new dock extending along the entire river front of said premises, so owned by them, but wholly
13 to the west of said dock and meandered line as established by the United States as aforesaid which they proposed to build in conjunction with the building of a new dock along the south 300 feet of said block 108, which was then, and is now, owned by the Calumet Grain and Elevator Company, and on which said company was also proposing to build a new dock. And that accordingly plans were prepared for the building of such new dock both in front of the premises so owned by your orators and the said south 300 feet of said block so owned by the said Calumet Grain and Elevator Company. And your orators show that said new dock was to be built entirely upon the land belonging to them and within the line so established as the dock line by the United States.

That said plans were thereafter submitted on behalf of your orators by your orator, David Mark Cummings for himself and your oratrix, Grace Dunlap Kennedy and by said Calumet Grain and Elevator Company in its own behalf to the Secretary of War of the United States and to the Chief of Engineers of the United States Army, and application was made to said Secretary of War for permission to rebuild said dock in front of said dock 108 along the lines shown on said plans.

That the said plans for the building of said dock were approved by the United States engineer, stationed at the city of Chicago, and subsequently recommended by the said Chief of Engineers, and that under date of May 12, 1900, Elihu Root, Secretary of War of the United States granted permission to your orator, David Mark Cummings, as executor of said estate, who in making said application was acting both for himself and your oratrix, Grace Dunlap Kennedy to rebuild said dock 108, so owned and held by your orators, along the lines shown by said plans subject however to the condition that the work of building said dock should be done subject to the supervision and approval of the engineer officer of the United States
14 Army in charge of the locality, and at the same time granted similar permission to said Calumet Grain and Elevator Company to build its proposed dock in front of said south 300 feet of said block along the lines shown by said plan, and issued to your orator David Mark Cummings as executor of said estate (who was acting also for your oratrix, Grace Dunlap Kennedy as aforesaid) and to said Calumet Grain and Elevator Company, a written permit for the building of said proposed dock along the lines shown on said plans, which was attached to said permit and made a part thereof, which permit recited and set forth the provisions of said

section 10 of said act of Congress, approved March 3, 1899, which is hereinabove set forth. And your orators attach hereunto, marked Exhibit B, a copy of said permit and of the plan attached thereto, which they pray may be taken as part of this bill of complaint.

And your orators aver and charge the fact to be that said permit was issued and said permission granted to said Secretary of War under and in accordance with the provisions of said act of Congress approved March 3, 1899; and that upon the approval and recommendation of the said plan for the building of said proposed dock by the said Chief of Engineers and upon the authorization thereof by said Secretary of War and the issuance of said permit your orators became of lawful right entitled by virtue of the said provisions of said act of Congress of March 3, 1899, to build said proposed dock in front of said premises so owned by them along the lines shown by said plans, subject only to the said condition that said work should be subject to the supervision and approval of the engineer officer of the United States Army in charge of this locality.

Your orators further show that after the granting of said permission and the issuance of said permit by said Secretary of War, they entered into a contract with certain contractors for the furnishing of material and the building of said dock in front of their
15 premises in accordance with said permit and along the lines shown by said plan attached to said permit, and caused every necessary preparation to be made for the speedy prosecution of said work, and heretofore, about the 15 day of October, 1900, entered upon said work and were engaged in the prosecution thereof by their contractors and agents, when the City of Chicago by its police and its officials and agents by force and by threats of arresting the men engaged in said work put a stop to it, asserting, that no permit for the building of said dock had been first issued by it or by its agents or officers and that such work could not be prosecuted unless a permit therefore should be issued from the department of public works of said city.

That said Calumet river at its mouth and at the point where your orators were constructing said dock by and under said permit from the Secretary of War is within the limits of the city of Chicago, and that said City of Chicago asserted and claimed the right to put a stop to said work and to prevent those, who were engaged in it, from continuing therein, because no permit had been issued from its department of public works, under certain ordinances, which had been theretofore passed by its city council, and which purported to prescribe that it should be the duty of the harbormaster of said city to require all parties, who should be engaged in repairing, renewing, altering, or constructing any dock within the city of Chicago to produce such permit, and in default of the production thereof to cause the arrest of such parties so engaged in such work, and to cause the removal of such dock.

That the officials of said city of Chicago asserted and claimed the right to stop said work and prevent its further prosecution, notwithstanding that the Secretary of War had granted permission and

authority for its prosecution, but that thereafter upon fur-
16 ther consideration thereof the city engineer of said city, who was and is the officer in the department of public works of said city, who has supervision and charge of the building of docks within the city of Chicago, agreed with your orators that the city had no power or authority to interfere with or prevent the building of said dock by your orators, after it has been approved and authorized by the Secretary of War in accordance with the provisions of the said act of Congress, approved March 3, 1899, and agreed that said work should not be interfered with by the city or its agents. That thereupon your orators by their agents immediately renewed said work and were actively engaged therein, when on the 29th day of October, A. D. 1900, they were again stopped by the said city of Chicago through its police, and their contractors and agents and servants were forced to discontinue said work, and were threatened with arrest and violence if they should attempt to continue further with said work.

Your orators further show that said City of Chicago has by its officers and agents notified your *your* orators, that they will not be permitted to continue said work or to build said dock in front of said premises, notwithstanding the permission and authority so given to them for the building thereof by said Secretary of War, and that it will by its police forcibly prevent the building thereof and will arrest those, who shall be engaged in doing such work, and will remove any dock so built; and it wholly refuses to recognize the permission and authority given to your orators by said Secretary of War to build said dock and your orator's right under the Constitution and laws of the United States and more particularly under said act of Congress of March 3, 1899, to build it by virtue of the said authority and permission granted by the Secretary of War and the approval and recommendation of the plans therefor by the Chief of Engineers of the United States Army.

17 And your orators aver and claim under the acts of Congress hereinabove set forth the right to build said dock in front of their said premises in accordance with the permit so issued by the Secretary of War and along the lines shown upon the plan attached thereto, a copy of which is "Exhibit B" to this bill, and your orators charge that the United States has taken and now exercises express jurisdiction over said Calumet river and has exclusive jurisdiction with respect to what structures shall be permitted to be built in said river and on what lines, and that the said City of Chicago has no power or authority to interfere with or prevent your orators from building said dock in front of their premises in accordance with the permission granted them by the Secretary of War by virtue of the said act of Congress of March 3, 1899, and along the lines shown by said plan, which has been approved and recommended by the said Chief of Engineers, and is acting in violation of your orators' rights and contrary to law in so doing.

Your orators further show, that they fear in view of the action heretofore taken by said city and its police in stopping said work and of the notice which has been given to your orators and the

threats which have been made of forcibly stopping said work and of arresting all who shall attempt to continue therein, that any attempts on their part to continue further with said work will necessarily be futile and will lead to breaches of the peace and conflicts between the men engaged in said work and the police of the city of Chicago.

Your orators further show that the right to build said dock in front of your orators' premises in accordance with the permission and authority given them as aforesaid by the Secretary of War and on the lines recommended by the Chief of Engineers aforesaid and within the dock line established by said survey and by said
18 deed from said Cummings to the United States is a property right, which your orators now have as the owners of said premises and of the land upon which said dock is to be built and that the action of the City of Chicago in thus preventing the building of said dock by your orators is a taking of your orators' property without due process of law, and a taking thereof for public use without just compensation, in violation of the 5th amendment to the Constitution of the United States. And that the matter in dispute in this cause exclusive of interest and costs exceeds the sum or value of two thousand dollars.

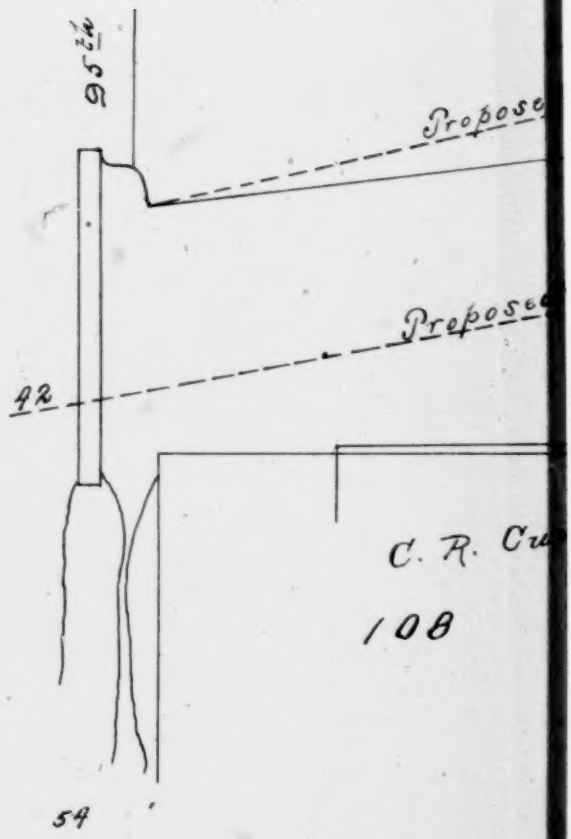
And your orators show that they have no adequate remedy at law, and no remedy whatsoever, unless the City of Chicago and its agents shall be enjoined from further interfering with the building of said dock.

Wherefore and forasmuch as your orators are remediless save in this honorable court, and to the end that the said City of Chicago may be made a party defendant hereto, and required to answer this bill (but not under oath, the oath to said answer being hereby waived,) your orators pray, that a writ of injunction issue preliminarily out of this honorable court, enjoining the said City of Chicago, its officers and agents, from in any manner interfering with the building of said dock in front of said portion of said block 108, so owned by your orators, in accordance with the permission granted by the Secretary of War for the building thereof and along the lines shown in said plan recommended by the Chief of Engineers of the United States Army, and from attempting to prevent the building of said dock, and from arresting or attempting to arrest any person or persons engaged in the work of building said dock.

That upon the final hearing of this cause it may be adjudged and decreed, that under the said acts of Congress, herein set forth, your orators have the right by virtue of the permission so granted by the Secretary of War to build said dock on the lines shown by
19 the plan recommended by said Chief of Engineers, and that the said City of Chicago has no right, power or authority to interfere therewith; and that said preliminary injunction may be made perpetual.

And that your orators may have such other and further relief, as may be meet and fitting in the premises.

And may it please your honors to grant unto your orators a subpœna of the United States issuing out of and under the seal of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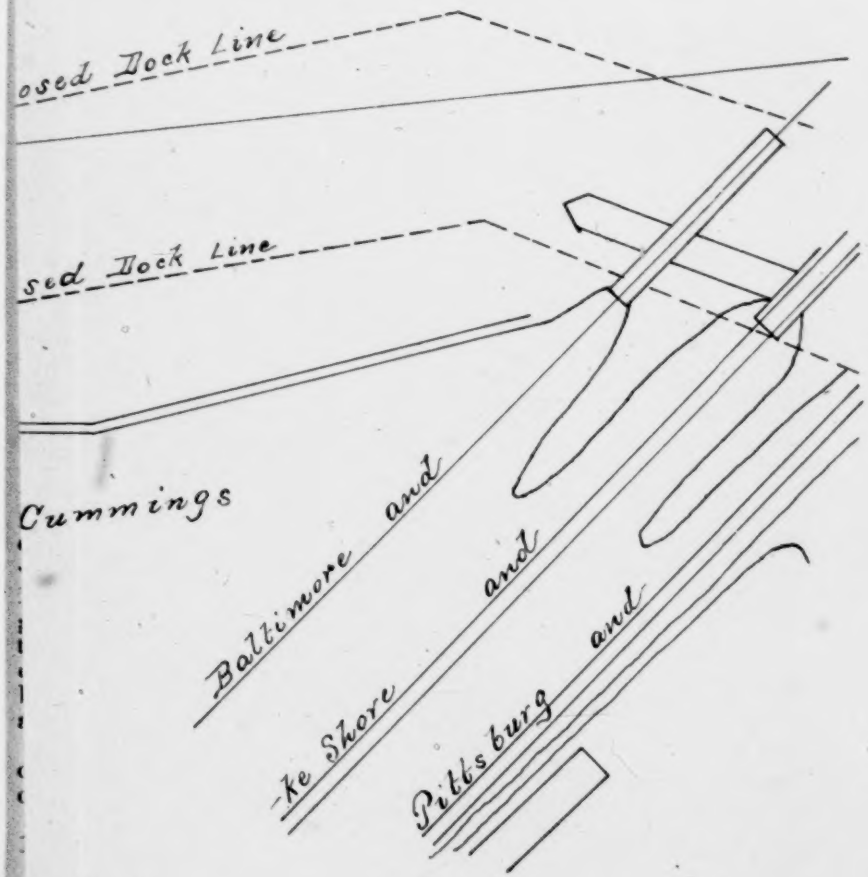
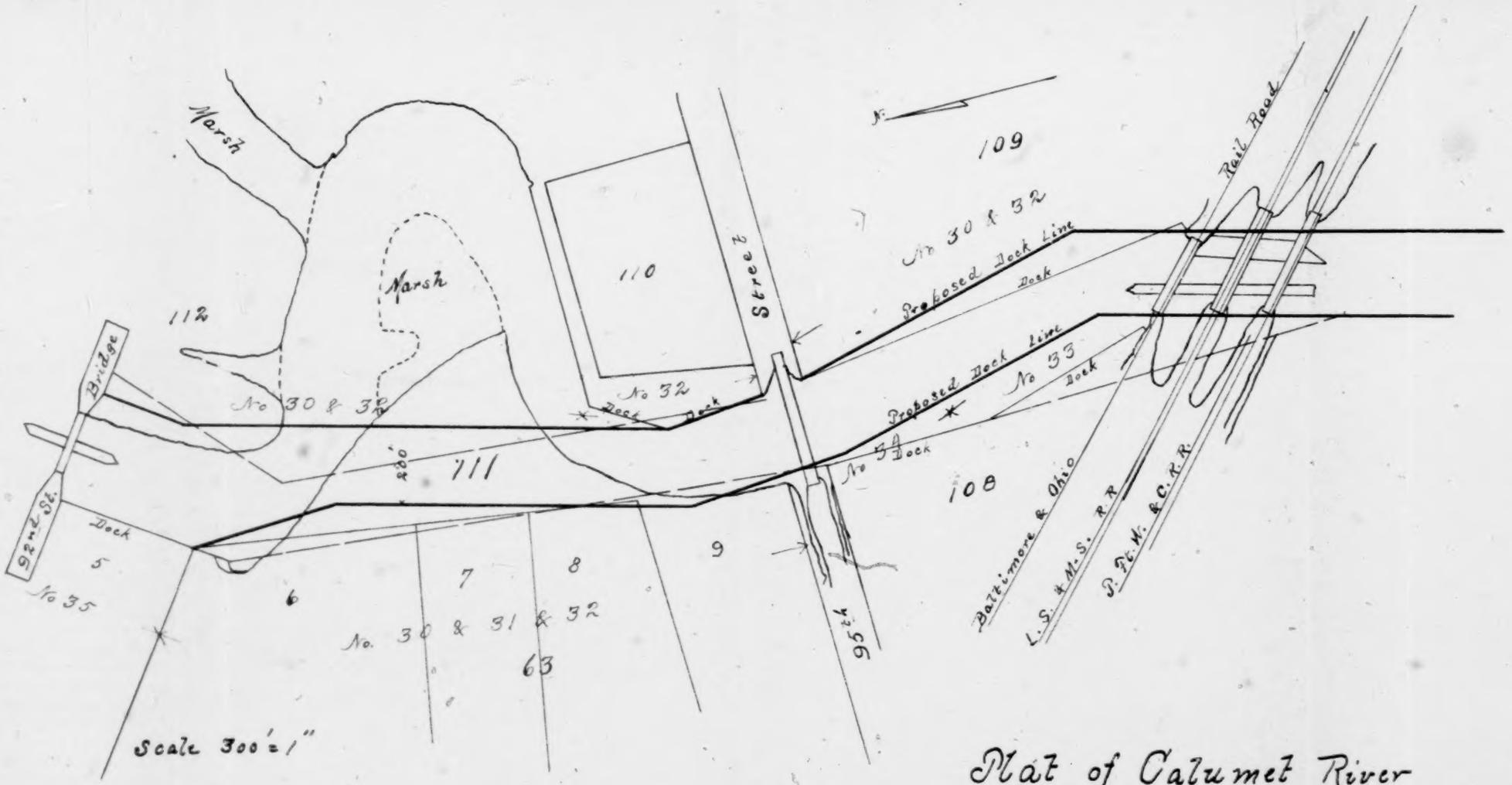


Exhibit "A"



Plat of Calumet River

Respecting Cessions of Right of Way for Improvements of said River under Act of Congress approved July 5th 1884.

Recorded in Book 39 Pages 1 to 9, May 17, 1889.

this honorable court, directed to the City of Chicago, a municipal corporation defendant herein, therein and thereby commanding it on a day certain therein to be named and under a certain penalty therein to be expressed to be and appear before this honorable court then and there to answer (but not under oath, such oath being hereby expressly waived) all and singular the premises, and to stand to, perform and abide by such order directions and decree as may be made against it, and as to your honors shall seem meet.

And your orators will ever pray, etc.

DAVID MARK CUMMINGS AND
GRACE DUNLAP KENNEDY,
By S. A. LYNDE, *Their Solicitor.*

S. A. LYNDE,
Counsel for Complainant.

STATE OF ILLINOIS, } ss:
Cook County, }

Otho S. Gaither, being first duly sworn, says that he is the agent of the said complainants, David Mark Cummings and Grace Dunlap Kennedy and has been their agent both in their individual behalf and as the executors of the estate of Columbus R. Cummings, deceased, and has had charge for them of the said premises described in the foregoing bill of complaint, to wit: that portion of said block 108 which is now owned as is alleged and stated in said bill of complaint, since the death of the said Columbus R. Cummings, to wit since the 12th day of July A. D. 1897.

This affiant further says that he has read the foregoing bill of complaint of the said David Mark Cummings and Grace Dunlap Kennedy and knows the matters which are therein set forth and stated and that the same are true in manner and form as therein stated and set forth.

This affiant further says that as the said agent of the said complainants he has made, on their behalf, a contract for the building of said dock in accordance with the permission granted by the Secretary of War as is alleged in said bill of complaint and has charge of the building of said dock for said complainants by the contractors, and that notice was duly given to him as the agent of said complainants by the officials of the city of Chicago on the 29th day of October A. D 1900, that the city of Chicago would not permit said work to be prosecuted and that the same must be stopped. And that the city of Chicago by its police would prevent the completion thereof and that said city of Chicago thereupon by its police did prevent the further prosecution thereof and cause said work to be stopped.

OTHO G. GAITHER.

Subscribed and sworn to before me this 7th day of November A. D. 1900.

[SEAL.] H. C. SALTONSTALL,
Notary Public.

(Here follow diagrams marked pp. 21 & 22.)

23 Form No. 5. J. A. G. O. (8185).

Whereas, by section 10 of an act of Congress, approved March 3, 1899, entitled "An act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes," it is provided that it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same;

And whereas, D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain & Elevator Company have applied to the Secretary of War for permission to rebuild the dock in front of that part of block 108, in sections 5 and 6, T. 37, R. 15, E., fronting on Calumet river, south of 95th street, Chicago, Illinois, along the lines shown on the attached plans, which have been recommended by the Chief of Engineers;

Now therefore this is to certify that the Secretary of War hereby gives unto said D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain & Elevator Company permission to rebuild the dock, at said place, along the lines shown on said plans, subject to the following condition;

That the work herein permitted to be done shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality.

Witness my hand this 12th day of May, 1900.

(Signed) ELIHU ROOT,
Secretary of War.

[Seal of United States of America.]

EXHIBIT "B." (Copy.)

(Here follows diagram marked p. 24.)

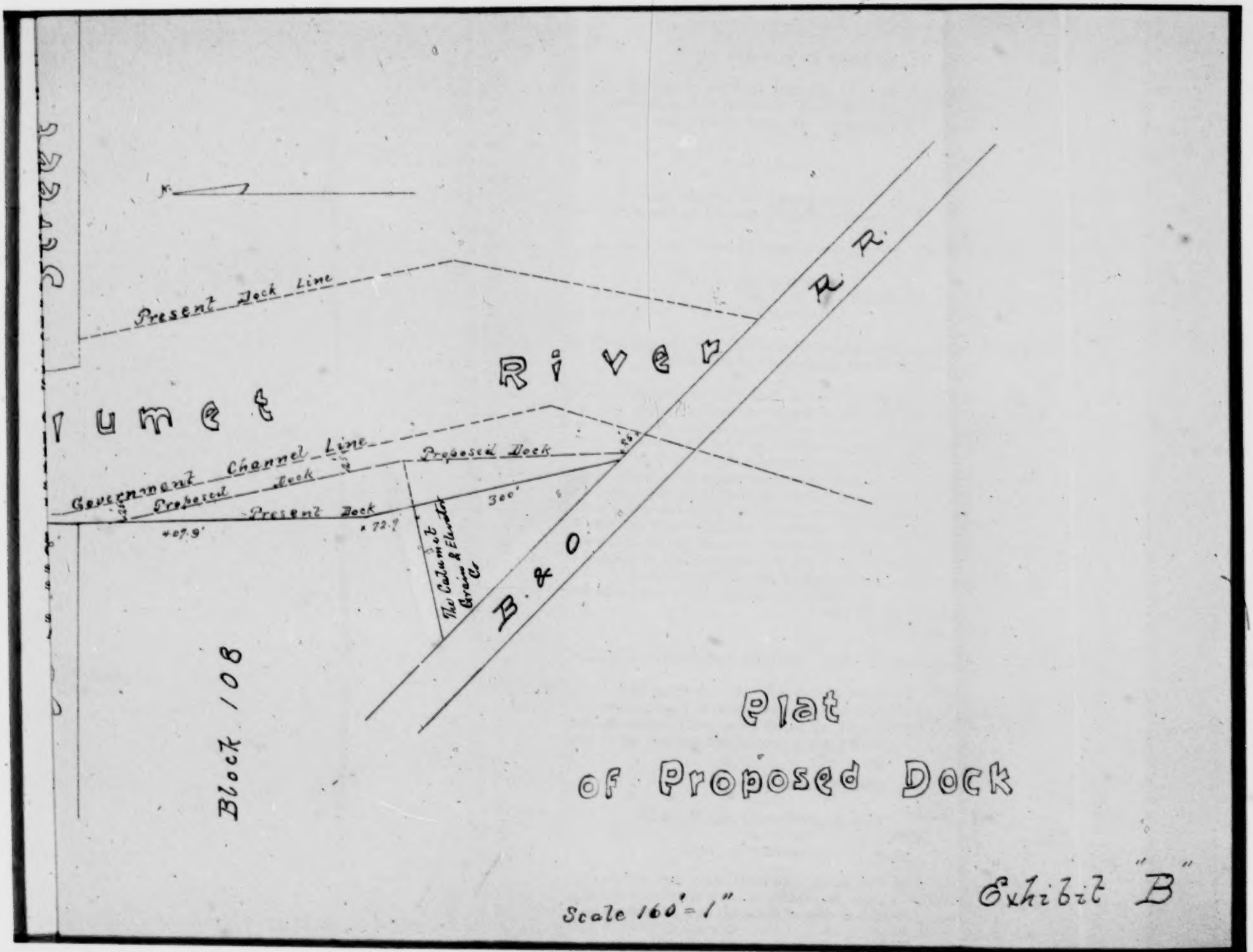
Sixth

Gover

Main

200'

Seventh


Present Dock Line
R. R.
Government Channel Line
Proposed Dock
Proposed Dock
Present Dock
300'
407.9'
72.7'
The Calumet Grain & Elevator Co
B. & O
Block 108
Plat
of Proposed Dock
Scale 160' = 1"
Exhibit "B"

25 And on to wit: the 19th day of November, 1900, came the defendant, by Charles M. Walker and filed in the clerk's office of said court its certain demurrer in words and figures following to wit:

Demurrer.

UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division, } *ss.*:

In the United States Circuit Court Hereof. In Chancery.

DAVID M. CUMMINGS }
vs. } No. 25737.
CITY OF CHICAGO. }

The demurrer of City of Chicago, defendant, to the bill of complaint of David M. Cummings, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, demurs to said bill, and for cause of demur shows, that the complainant has not in and by his said bill, made or stated such a case as entitles him, in a court of equity, to any discovery or relief from or against this defendant touching the matters contained in said bill, or any of such matters.

Wherefore this defendant demurs to the said bill, and to all the matters and things therein contained, and prays the judgment of this honorable court whether it shall be compelled to make any further or other answer thereto, and prays to be dismissed with its reasonable costs in this behalf sustained.

CHARLES M. WALKER,
Solicitor for Defendant.

(Endorsed:) Filed Nov. 19, 1900. S. W. Burnham, clerk.

26 And on to wit: the 8th day of February, 1901, in the December term of said court, 1900, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, district judge appears the following entry to wit:

Order of February 8, 1901.

DAVID MARK CUMMINGS ET AL. }
vs. } 25737.
CITY OF CHICAGO. }

The court having considered and being now fully advised in the premises, it is ordered that the motion of complainants for preliminary injunction be, and the same hereby is denied.

27 And on to wit: the 14th day of May, 1901, being one of the days of the regular December term of said court, 1900, in the record of proceedings thereof, in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to wit:

Order of May 14, 1901, *Dismissing Bill and Allowing Appeal.*

DAVID MARK CUMMINGS, GRACE DUNLAP KENNEDY,
vs.
CITY OF CHICAGO. } 25737.

And now on this day the above-entitled cause came on for hearing in this court before the Honorable Christian C. Kohlsaat, one of the judges thereof, upon the demurrer of the defendant, The City of Chicago, to the bill of complaint herein, and the court being sufficiently advised in the premises, does order, adjudge and decree, that the said demurrer be sustained, and that the said bill of complaint be dismissed out of this court for want of equity and that the defendant, The City of Chicago, recover from the complainants, its costs herein to be taxed.

And the complainants thereupon in open court object and except to each of said orders and pray an appeal to the Supreme Court of the United States from said decree, dismissing their said bill for want of equity and adjudging them to pay to the defendant The City of Chicago, its costs, and do now file their assignment of errors, which said prayer for an appeal is granted, and said appeal allowed, upon the complainants filing their bond in the penal sum of five hundred dollars with good and sufficient security to be approved by
28 the court, that the appellants shall prosecute their said appeal to effect and if they fail to make their plea good shall answer all damages and costs.

And thereupon the said appellants presented their appeal bond herein conditioned as above with Otho S. Gaither, as surety, which said bond is now approved.

29 And on to wit the 14th day of May, 1901, came the complainants in said entitled cause by their solicitor and filed in the clerk's office of said court their assignment of errors in words and figures following, to wit:

Assignment of Errors.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

DAVID MARK CUMMINGS, GRACE DUNLAP KENNEDY, Appellants, *vs.* THE CITY OF CHICAGO, Appellee. } 25737.

Assignment of errors.

And now on this day, comes the complainants, and say there is manifest error in the decree, record and proceedings of the court in the above-entitled cause, in this, to wit:

1st. The court erred in sustaining the demurrer of the defendant, The City of Chicago, to the bill of complaint herein.

2nd. The court erred in entering the final decree herein dismissing the bill of complaint out of court for want of equity and decreeing that the complainants pay the said defendant its costs.

Wherefore, said appellants, David Mark Cummings and Grace Dunlap Kennedy, pray that said decree be reversed, annulled and held for naught and said cause remanded to the circuit court for further proceedings.

DAVID MARK CUMMINGS AND
GRACE DUNLAP KENNEDY, *Compl'ts,*
By S. A. LYNDE, *Their Solicitor and Counsel.*

(Endorsed:) Filed May 14, 1901, S. W. Burnham, clerk.

30 And on to wit: the 14 day of May, 1901, came the complainants in said entitled cause and filed in the clerk's office of said court in said entitled cause their certain bond on appeal in words and figures following to wit:

Bond on Appeal.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } ss:

In the Circuit Court of the United States for the Northern District of Illinois.

DAVID MARK CUMMINGS, GRACE DUNLAP KENNEDY, Appellants, *vs.* THE CITY OF CHICAGO, Appellee. } 25737.

Know all men by these presents, that we, David Mark Cummings, and Grace Dunlap Kennedy, as principals and Otho S. Gaither, as

sureties, are held and firmly bound unto the City of Chicago in the penal sum of five hundred dollars ($500.00) for the payment of which well and truly to be made, we do hereby bind ourselves, our heirs and legal representatives jointly and severally firmly by these presents.

The condition of the above obligation is such that whereas the above-bounden, David Mark Cummings and Grace Dunlap Kennedy have taken an appeal to the Supreme Court of the United States from the final decree of the circuit court of the United States for the northern district of Illinois in the above-entitled cause.

Now, therefore, if the above-bounden, David Mark Cummings and Grace Dunlap Kennedy, shall prosecute their appeal to effect and if they fail to make their plea good shall answer all
31 damages and costs, then this obligation to be void, otherwise to remain in full force and effect in law.

Given under our hands and seals at Chicago, this 10th day of April, 1901.

DAVID MARK CUMMINGS. [SEAL.]
GRACE DUNLAP KENNEDY. [SEAL.]
OTHO S. GAITHER. [SEAL.]

O. K.
ARMAND F. TEEFY,
Ass't Corporation Counsel,
Sol'r for City of Chicago.

Approved: May 14, 1901.

KOHLSAAT, *Judge.*

(Endorsed:) Filed May 14, 1901. S. W. Burnham, clerk.

32 And on to wit the 26th day of June, 1901, in the December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to wit:

Order of June 26, 1901.

DAVID MARK CUMMINGS ET AL.
vs. } 25737.
THE CITY OF CHICAGO.

It appearing to the court that by error of the clerk there appears of record in this cause an order under date of February 23rd, 1901, dismissing the bill of complaint herein, which order and decree was not in fact entered herein until the 14th day of May, 1901, it is ordered that the decree in this cause be corrected and that said entry of said supposed order and decree of February 23rd, 1901, be expunged from the record herein.

33 And on to wit the 26th day of June, 1901, in the December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to wit:

Order of June 26, 1901.

DAVID MARK CUMMINGS ET AL.
vs.
THE CITY OF CHICAGO. } 25737.

And now on this day upon full consideration, it is ordered, adjudged and decreed, that the entire order entered in this cause, the 12th day of June, 1901, setting aside the former decree rendered in this cause the 14th day of May, 1901, and dismissing the said bill for want of equity, allowing an appeal and approving appeal bond and granting complainant leave to amend, be and the same is vacated and the said decree rendered in this cause on the 14th day of May and all orders set aside and vacated by said orders of June 12th, 1901, be and the same are ordered to stand in full force as if said orders of June 12th, 1901, had not been entered.

34 And on to wit the 26th day of June, 1901, in the December term of said court, 1900, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge appears the following entry to wit:

Order of June 26, 1901, *Extending Time to File Transcript in Supreme Court.*

DAVID MARK CUMMINGS ET AL.
vs.
THE CITY OF CHICAGO. } 25737.

And now on good cause shown, it is ordered that the time for the complainants to file transcript of the record herein in their appeal from the decree of the 14th of May, 1901, to the United States Supreme Court be, extended to the 20th of July 1901.

35 NORTHERN DISTRICT OF ILLINOIS, } *ss:*
Northern Division,

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of all the proceedings had of record in said court and made in accordance with præcipe filed herein, in the cause entitled David Mark Cummings and Grace Dunlap Kennedy, complainants *vs.* City of Chicago, defendant, as the same appear from the original records and files of said court now remaining in my custody and control.

Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district, this 12 day of July 1901.

S. W. BURNHAM, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

To the City of Chicago, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing appeal filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein David Mark Cummings and Grace Dunlap Kennedy — appellants and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant- as in the said decree mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Christian C. Kohlsaat district judge this fourteenth day of May, in the year of our Lord one thousand nine hundred and one.

KOHLSAAT, *Judge.*

S. A. LYNDE.

[Endorsed:] No. 25737 Supreme Court of the United States Citation to the Supreme Court of the United States Filed Jun- 7, 1901 S. W. Burnham clerk.

37 On this seventh day of June, in the year of our Lord one thousand nine hundred one, personally appeared before me, the subscriber, Sherman M. Booth Jr. a clerk in the office of Samuel A. Lynde attorney for the complainants herein and makes oath that he delivered a true copy of the within citation to William Loeffler, city clerk of the defendant, City of Chicago, a municipal corporation etc.

SHERMAN M. BOOTH, JR.

Sworn to and subscribed the 7th day of June A. D. 1901.

H. S. STODDARD, *U. S. Com'r.*

Endorsed on cover: File No. 18,226. N. Illinois C. C. U. S. Term No. 373. David Mark Cummings and Grace Dunlap Kennedy, appellants, *vs.* The City of Chicago. Filed July 15, 1901.

15925